SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000524-001 DT 01/12/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

BENNETT'S OIL CO

JOHN M PEARCE

v.

STEPHEN A OWENS (001)
ARIZONA STATE DEPARTMENT OF ENVIRONMENTAL QUALITY (001)

STEPHEN A OWENS
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1110 W WASHINGTON ST
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BARBARA U RODRIGUEZ

OFFICE OF ADMINISTRATIVE HEARINGS

MINUTE ENTRY

This Court has jurisdiction of this administrative appeal pursuant to the Administrative Review Act, A.R.S. § 12-901, et seq. This case has been under advisement and the Court has considered and reviewed the record of the proceedings before the Arizona Department of Environmental Quality ("ADEQ"), the Office of Administrative hearings ("OAH") and the memoranda submitted by counsel.

1. Factual and procedural background

This action appeals from a final administrative decision by ADEQ denying most of a claim submitted by Bennett's Oil Co. ("Bennett's") against the State Assurance Fund ("SAF") requesting reimbursement for corrective actions undertaken in response to a petroleum release from Underground Storage Tanks ("USTs") on Bennett's property. Bennett's formally appealed the original denial of reimbursement through the administrative process before the OAH.[1] ADEQ filed a motion for summary judgment urging the Administrative Law Judge ("ALJ") to dismiss the Bennett's appeal because, according to ADEQ, the costs were not eligible for

[1] A.R.S. § 49-1091 and §§ 41-1092 et seq.

reimbursement pursuant to A.R.S. § 49-1054(E.). Bennett's filed a cross motion for summary judgment. Both parties argued that the governing statute required ruling in their respective favor as a matter of law. The ALJ issued a Recommended Decision and Order recommending that ADEQ dismiss Bennett's appeal.[2] The Director accepted the recommended order of the ALJ and dismissed the appeal.[3]

The matter was decided by the ALJ based on the following undisputed material facts. Bennett's is the owner/operator of USTs in Prescott, Arizona.[4] Contamination that required corrective action was discovered upon removal of the USTs. Bennett's has been engaged in the performance of corrective action at the site since September 15, 1989.[5] Both Bennett's and its carrier Federated Mutual Insurance Company ("Federated") have submitted multiple applications to the SAF for reimbursement of costs associated with the remediation.[6]

Bennett's and its carrier Federated have together made five applications to the SAF for costs incurred through remediation efforts at the site. The first two applications were submitted prior to the effective date of A.R.S. § 49-1054(E) and were approved. In 1996, the controlling statutory provision, A.R.S. § 49-1054(E), was enacted by the Arizona Legislature.[7] The next two applications were submitted after the effective date of the statute and were approved. The fifth application, the one that is the subject of this action, was also submitted after the effective date of the statute.[8] ADEQ issued its Final Order denying the fifth application in part.[9] The application that is the subject of this action was submitted to the SAF by Federated, the carrier having paid consultants directly for the remediation efforts for which reimbursement is sought from the fund.[10]

In its Motion for Summary Judgment, ADEQ argued that A.R.S. § 49-1054(E) provides that the SAF is only a secondary source of coverage if a regulated entity possesses insurance for a claimed release. Because Bennett's had valid insurance coverage for the costs claimed in its application, the statute precluded Bennett's, or its designee, from receiving funds from the SAF. Bennett's sought summary judgment in its favor, arguing the statute by its plain language, did not preclude the claim submitted by Bennett's for payment to its carrier Federated for costs incurred directly by Federated.

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[2] Order Granting the Department of Environmental Quality's Motion for Summary Judgment Under A.R.S. § 49-1054(E) and Denying Bennett Oil Company's Cross' Motion for Summary Judgment. (Amended), April 8, 2003 ("ALJ Order").
[3] ADEQ Final Decision and Order, April 25, 2003 ("ADEQ Final Order").
[4] ALJ Order, Undisputed material Facts, ¶ 1.
[5] *Id.*, ¶ 2. A.R.S. § 49-1001, et seq. requires the owner operator of UST to take corrective action as a result of leaks or releases from the USTs.
[6] *Id.*, ¶ 5.
[7] *Id.*, ¶ 7.
[8] *Id.*, ¶¶ 6, 8. The first two applications were approved for $82,175.73. The next two applications were approved for $75,573.97.
[9] *Id.* ¶¶ 4, 8, n. 3. The claim was for $46,432.92. The SAF approved for payment only $2,991.19 of that claim.
[10] *Id.*, ¶ 9, n. 5 ("In actuality, each of the five applications was submitted by Federated Insurance Company.").

The ALJ decided that a reasonable reading of A.R.S. § 49-1054(E) "requires that owners or operators, such as is Bennett Oil Company, not receive reimbursement from the SAF until after they have exhausted potential insurance proceeds and have certified to the SAF that the reimbursement sought is not susceptible to collateral coverage."[11] Based on that reading of the provision, the ALJ granted ADEQ's Motion for Summary Judgment, denied Bennett's Cross Motion for Summary Judgment, and recommended that the Director of ADEQ dismiss Bennett's appeal.[12] Thereafter, the Director of ADEQ accepted the recommended order and dismissed Bennett's appeal.[13] Plaintiff timely filed an appeal to this Court.

2. Standard of Review

The sole issue in the appeal is whether A.R.S. § 49-1054(E) precludes an owner/operator, such as Bennett's, from receiving payment for the SAF because the owner/operator had an insurance policy that covered the corrective action expenses. On appeal of an administrativeagency's decision pursuant to the Administrative Review Act, the Superior Court determines whether the administrative action was supported by substantial evidence, was contrary to law, was arbitrary and capricious, or was an abuse of discretion.[14] As to questions of fact, this Court does not substitute its conclusion for that of the administrative agency, but reviews the record only to determine whether substantial evidence supports the agency's decision.[15] Questions of statutory interpretation involve questions of law and the appellate court is not bound by the administrative agency's conclusion.[16] The reviewing court applies its own independent judgment to questions of statutory interpretation.[17] The reviewing court may draw its own conclusions as to whether the administrative agency erred in its interpretation and application of the law.[18]

3. Discussion

This Court must determine whether A.R.S. § 49-1054(E) prohibits Bennett's or its designee, Federated, from receiving payment from the SAF because pursuant to Bennett's insurance policy

[11] *Id*. Conclusions of Law, ¶ 3.
[12] *Id.* Conclusions of Law, ¶ 6, Recommended Order.
[13] ADEQ Docket No. 02A-F-077-DEQ, Final Decision and Order, April 25, 2003.
[14] A.R.S. § 12-910(G); *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136 (App. 1991).
[15] *Petrlas v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107 (App. 1981). In this case, the matter was decided on undisputed material facts pursuant to cross motions for summary judgment. The facts relied upon by the ALJ are not questioned in this appeal and this Court accepts the statement of undisputed material facts.
[16] *Seigal v. Arizona State Liquor Board,* supra.
[17] *Webb v. State ex rel. Arizona Bd. of medical Examiners*, 202 Ariz. 555, 557, 48 P.3d 505, 507 (App. 2002).
[18] *Carondelet Health Services v. Arizona Health Care Cost Containment System Administration*, 182 Ariz. 502, 504, 897 P.2d 1388 (App. 1995).

with Federated, the insurer directly paid the corrective action expenses. Bennett's contends that the ADEQ's denial of its claim was contrary to the plain language of the statute, was contrary to the intent of the statute as evidenced by the legislative history, and was contrary to ADEQ's historical application of the statute.[19]

Because this appeal rests solely on the interpretation of A.R.S. § 49-1054(E), that statute is set forth in its entirely. Before 1995, that section did not exist and A.R.S. § 49-1054 did not reference insurance. Subsection E was enacted in 1995, effective March 13, 1996:

> E. An owner or operator shall not receive payment from the department until after the owner or operator has submitted certification to the department that the owner or operator has submitted a claim against any applicable insurance coverage and has certified to the department the amount of any benefits or reimbursement that the owner or operator has received or will receive from any insurance coverage that might apply to the costs of the corrective action. The owner or operator is eligible for payment from the department to the extent that the corrective action costs have not been and will not be reimbursed by insurance and within the coverage limits prescribed by this section. An owner or operator shall report to the department whether it has insurance coverage available and shall comply with all applicable financial responsibility requirements. The department may compel the production of documents to determine the existence, amount and type of coverage available. An owner or operator shall report to the department any subsequent payment or reimbursement for claims made for corrective actions costs. The owner or operator shall remit to the department within thirty days any amounts that were previously paid to the owner or operator from the underground storage tank revolving fund assurance account and that have also been recovered from insurance.

The ADEQ reads the language of the statute to manifest legislative intent to require that participants and claimants in and to the SAF look to the fund as a secondary source for reimbursement, after primary insurance recovery has been exhausted, and coincidentally, to guard against a potential for "double-dipping" by claimants.[20] Bennett's reads the provision to manifest legislative intent to prohibit "double-dipping."[21] Bennett's claim against the SAF is on behalf of its designee, Federated. Federated directly paid for the corrective actions and the claim seeks payment directly to Federated, Bennett' insurance carrier.

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[19] Plaintiff/Appelleant's Opening Brief, September 11, 2003 (opening Brief), p. 5.
[20] ALJ Order, The Issue, page 2. "Double-dipping" throughout these proceedings refers to a claimant receiving both insurance proceeds and reimbursement from the SAF for remediation expenses.
[21] *Id.*, pages 2-3; Opening Brief, pp.7-8.

To interpret a statute and determine the legislative intent, the Court first looks to the language of the statute itself. If the statutory language is clear and unambiguous, the Court does not go further.[22] The unambiguous language of the statute will ordinarily be regarded as conclusive.[23] The ALJ concluded that the unambiguous language of the statute requires that owners or operators not receive reimbursement from the SAF unless they have exhausted insurance proceeds and certified that the reimbursement sought is not susceptible to collateral coverage.[24] This Court agrees that the statute is unambiguous and that it prohibits reimbursement from the SAF for expenses that are covered by insurance.

A.R.S. § 49-1054(E) provides that an owner or operator cannot receive payment from the department until it certifies that it has submitted a claim against applicable insurance coverage and has not received benefits or reimbursement from any insurance overage. In addition, the owner or operator is eligible for payment from the SAF only "to the extent that the corrective action costs have not been reimbursed by insurance…."[25] Bennett's contends that the provision merely prohibits an owner from receiving SAF funds if that owner has received funds from its insurance carrier. If Bennett's had paid for corrective action costs, and then been reimbursed by insurance for those costs, Bennett's would not be eligible for payment from the SAF. Because Federated incurred the corrective action costs directly, Bennett's can "submit a claim for the costs Federated incurred and assign the payment to Federated." [26] According to that reading of the statute, the section prohibits payment from the SAF if the owner receives proceeds pursuant to insurance coverage, but allows payment from the SAF if the insurer directly pays the corrective action costs pursuant to insurance coverage. This Court does not adopt that strained reading of the provision. The plain reading of the section clearly intends that the SAF be secondary payor after insurance coverage has been exhausted.[27]

Both Bennett's and ADEQ present extensive argument and supporting exhibits regarding the legislative history of A.R.S. § 49-1054(E).[28] Because the language of the statute is plain and unambiguous, this Court does not need to enquire beyond the language of the statute itself.[29] The language of the statute clearly sets forth the legislative intent that the SAF be a secondary payor of reasonable costs associated with eligible corrective activities.

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[22] *State v. Huskie*, 202 Ariz. 283, 285, 44 P.3d 161, 163 (App. 2002).
[23] *State ex rel Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983).
[24] ALJ Order, Conclusions of Law, ¶ 3.
[25] A.R.S. § 49-1054(E).
[26] Opening Brief, p. 10.
[27] A.R.S. §49-1054(E) provides 1) that an owner shall not be paid from the fund until it certifies that is has not received insurance coverage for the costs claimed and identifies any such benefits expected in the future; 2) limits payment form the fund to claims not reimbursed or reimbursable by a third party; 3) establishes reporting requirements; and 4) requires reimbursement to the SAF of payment already received and that have also been recovered from insurance.
[28] Opening Brief, pp. 15-19; ADEQ'S Answering Brief, October 27, 2003, ("ADEQ'S Brief"), pp.13-14.
[29] *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993); *Arpaio v. Steinle*, 201 Ariz. 353, 35 P.3d 114 (App. 2001)("If the statute's language is clear and unambiguous, we give effect to that language and apply it without using other means of statutory construction, unless applying the literal language would lead to an absurd result.")

Bennett's also contends that the ADEQ's historic application of A.R.S. § 49-1054(E) is consistent with its reading of the statute and demonstrates the legislative intent to allow payment from the SAF to insurance carriers that directly incur costs of eligible corrective actions.[30] Bennett's and Federated submitted multiple applications to the SAF for payment in connection with the corrective action process at the Prescott site. These applications, except for the one that is the subject of this appeal, were approved for reimbursement from the SAF and in fact were paid with checks to Federated. Bennett's presented extensive history of applications to the SAF and payments to Federated in connection with those applications. In addition, Bennett's presented sworn statements of ADEQ fund administrators in support of its contention that the agency applied the statute to allow reimbursement from the fund to insurers that directly incur corrective action costs.[31] The undisputed facts set forth by the ALJ acknowledged the applications submitted and payments made by ADEQ after the effective date of the statute, however, the ALJ concluded that the agency's practice, proper or not, since the effective date of the statute "is not germane" to its interpretation of the provision.[32]

Ordinarily great weight is given to an agency's interpretation of a statute it implements.[33] However, the same deference will not be given to the agency's interpretation if the agency changes its interpretation to conflict with its earlier practice.[34] Based on the limited record set forth as the undisputed material facts, this Court concludes that the agency's practice, proper or not, and changed or not, is not helpful to the inquiry regarding the interpretation of the statute. The ALJ properly refused to consider the agency's past practices in implementing the statute. Moreover, even if the agency misapplied the statute in the past, there is a strong public policy against allowing the mistakes of an agency or employee to limit the government's ability to enforce its laws.[35] Accordingly, the Court's interpretation of A.R.S. §49-1054(E) is not influenced by the agency's implementation of it.

Conclusion

The language of A.R.S § 49-1054(E) clearly sets forth an intent that the SAF be the secondary payor of reasonable costs associated with eligible corrective activities undertaken after releases from underground storage tanks. This Court concludes that the language of the statute is

[30] Opening Brief, pp. 19-22.
[31] Id. Although ADEQ disputes that Bennett's accurately states the agency's policy, it concedes that its practices "may have resulted in insurance companies being paid from the SAF even though a valid policy covered the requested costs." ADEQ Brief, pp. 20-23.
[32] ALJ Order, Conclusions of Law, ¶ 3.
[33] E.g., U.S. Parking Systems v. City of Phoenix, 160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989).
[34] Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1457 (9th Cir. 1992).
[35] Lake Havasu City v. Arizona Dept. of Health Services, 202 Ariz. 549, 552, 48 P.3d 499, 502 (App. 2002). In that case, the Arizona court adopted the policy articulated by the United States Supreme Court in Brock v. Pierce County, 476 U.S. 253, 262, 16 S.Ct. 1834 (1986).

plain and unambiguous. Accordingly, the legislative history and surrounding circumstances are not applicable to the Court's interpretation of the section. In addition, this Court does not consider the agency's practices, past or present, in interpreting the statute. The ALJ properly interpreted the statutory provision and properly granted ADEQ's Motion for Summary Judgment and dismissed Bennett's appeal.

IT IS THEREFOR ORDERED denying all relief as requested by the Plaintiff, Bennett's Oil Co.

IT IS FURTHER ORDERED affirming the decision and determination of the Director of ADEQ.

IT IS FURTHER ORDERED that counsel for the defendant shall lodge an order consistent with this minute entry opinion no later than February 16, 2004.